No. 93-558

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
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RELIGIOUS TECHNOLOGY CENTER,
CHURCH OF SCIENTOLOGY INTERNATIONAL,
AND CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

vs.

DAVID MAYO, ADVANCED ABILITY CENTER, ROBIN SCOTT,
ADRIENNE SCOTT, RON LAWLEY, MORAG BELLMAINE,
STEVEN BISBEY, ADVANCED ABILITY CENTER
CANDA CRAIG, ADVANCED ABILITY CENTER EAST GRINSTEAD,
CHURCH OF THE NEW CIVILIZATION, HARVEY HABER,
JOHN NELSON, JON ZEGEL, VIVIAN ZEGEL,
Real Parties In Interest.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEROLD FAGELBAUM
Counsel of Record
LAW OFFICES OF JEROLD FAGELBAUM
2029 Century Park East, Suite 3270
Los Angeles, California 90067
(310) 286-7684
GARY M. BRIGHT
Counsel of Record
BRIGHT & POWELL
5464 Carpinteria Avenue, Suite E
Carpinteria, California 93013
(805) 684-8480

Attorneys for Real Parties In Interest, David Mayo, Church of the New Civilization, Harvey Haber, John Nelson, Vivian Zegel and DeDe Reisdorf

December 3, 1993

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QUESTIONS PRESENTED

1. Did the court of appeals properly conclude that Petitioners had failed to establish the existence of extraordinary circumstances warranting appellate interference with the district court's case management by means of the invocation of mandamus jurisdiction?

2. Did the court of appeals properly conclude that the district court's limited referral of discovery and pre-trial matters to a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure, while reserving to the district court ultimate authority on all such matters, was not clearly erroneous?

RULE 29.1 LIST

Real Parties In Interest herein have no parent companies, subsidiaries or affiliates to list pursuant to S.Ct. Rule 29.1.

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Real Parties In Interest, David Mayo, Church of the New Civilization, Harvey Haber, John Nelson, Vivian Zegel and Dede Reisdorf oppose the petition for writ of certiorari to review the

judgment of the United States Court of Appeals for the Ninth Circuit filed by the Petitioners herein.[1]

OPINIONS BELOW

The order of the court of appeals denying the petition for writ of mandamus is unreported. The order of the district court appointing a special master is unreported. Both orders are attached in the appendix to the Petition filed herein at (1a) and (3a), respectively.

JURISDICTION

The order of the court of appeals was filed on July 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Article III, § 1 of the Constitution of the United States provides:

> The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

28 U.S. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Federal Rules of Civil Procedure

Rule 53. Masters

> (a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein.

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[1]Parties to consolidated cases *Religious Technology Center, Inc., et al. v. Robin Scott, et al.*, No. CV 85-711(AWT), and *Religious Technology Center et al., v. Wollersheim, et al.*, No. CV 85-7197 (AWT).

* * *

(b) Reference. A reference to a master shall be the exception not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. * * *

STATEMENT OF THE CASE

Real Parties In Interest, David Mayo and Church of the New Civilization (hereinafter referred to as "Party Respondents"), hereby submit their Response to the Petition for Writ of Certiorari filed on behalf of Religious Technology Center, Church of Scientology International and Church of Scientology of California.

This is not the first time Petitioners have challenged the reference to the Special Master in this case. On June 27, 1990, the court of appeals *denied* a similar petition for writ of mandamus. At that time, in response to a request from the appellate court, the district court filed a declaration to provide the reasons behind the reference. In prophetic fashion, the district court then noted that both the prior district court judge and the magistrate previously assigned to the case had:

> "... told me that essentially similar matters were pursued repeatedly but always with a somewhat different twist that required the expenditure of more judicial time, and, like cutting off the head of a hydra, each judicial decision seemed to span a half dozen spin-off disputes."

(Declaration of the Hon. James M. Ideman, 5/16/90, at ¶ 2) (1a). True to form, this Petition is a re-hash of arguments repeatedly rejected in the past.

In their Petition, Petitioners seek to mask the fact that in connection with the *limited* discovery and pre-trial reference to the Special Master, the district court has remained faithful to the teachings of this Court, and reserved *to itself*, at the trial level, the

ultimate judicial decision making power in this case. Further, Petitioners' argument, that in the exercise of such review authority the district court's orders are concise and to the point, is at once a testament to the detailed underlying memoranda decisions and recommended orders issued by the Special Master (a distinguished jurist with over 20 years experience as a state court judge) as well as the vacuous nature of many of Petitioners' motions for review which were filed automatically after every ostensibly adverse decision of the Special Master.

Petitioners' "abdication of judicial authority" argument is nothing more than a code phrase for their real argument that the decisions which were rendered adverse to them were the product of judicial bias or prejudice. However, that argument has been rejected time and again *on the merits* by each jurist who has had the opportunity to hear it in this case.[2] Moreover, it is untrue.[3]

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[2]Petitioners' *first* recusal motion was denied by the Hon. Terry J. Hatter, Jr. on 7/9/90. Petitioners' *second* recusal motion (seeking disqualification of both the district court and the Special Master) was denied by the Hon. J. Spencer Letts on 11/22/91. A Petition for Writ of Mandamus was denied by the Ninth Circuit court of appeals on 12/4/91, and a Petition for Writ of Certiorari was denied by this Court on 5/26/92. A *third* motion for recusal was denied by Judge Letts on 11/6/92 and sanctions of $6,400 were imposed. A *fourth* recusal motion was denied by Judge Letts on 2/17/93. It was in connection with Petitioners' *fifth* attempt to recuse Judge Ideman that Petitioners filed their Writ of Mandamus with the Ninth Circuit Court of Appeals currently under challenge. However, it was Petitioners' harassment of Judge Ideman's former law clerk which prompted him to recuse himself from this case. Since then, this case has been re-assigned to the Hon. A. Wallace Tashima for trial.

[3]Although it is not discernible from the Petition, befitting their neutrality both the Special Master and the district court also have rendered decisions in this case adverse to Party Respondents. Thus, for example, concurrently with many of the orders of which Petitioners now complain, the district court also dismissed Real Parties In Interest's RICO and antitrust claims, and issued other rulings as requested by Petitioners.

The Petition represents only the latest example of how issues raised in this case by Petitioners have been argued and re-argued, slightly altered and argued again. It is one of the reasons that there exists an exceptional condition in this case warranting the additional attention a special master can offer so that in conjunction with the district court this case can be reduced to its essence and tried by the district court before a jury. The district court has not abdicated its responsibilities, the Petitioners have abused the adversarial and adjudicative process.

As a result, the Petition before this Court is not about judicial abdication of responsibility, but rather, it is about the district court's response to extraordinary demands which had been placed upon it by Petitioners and their abusive litigation policies.[4] In

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[4]Petitioners' strategy is to use the judicial system as a weapon against their perceived enemies:

> *Fair Game:* "Enemy — SP Order. Fair Game. May be deprived of property or ignored by any means by an Scientologist without discipline of the Scientologist. May be tricked, sued or lied to or destroyed." (HCOPL 10/18/67 Issue IV).
>
> *Predatory Use of Litigation:* "The purpose of the suit is to harass and discourage rather than to win. The law can be used very easily to harass, and enough harassment on somebody who is already on the thin edge anyway, well-knowing that he is not authorized, will generally be sufficient to cause his professional decease. If possible, of course, ruin him utterly" (Magazine Article On Level 0 Checksheet, by L. Ron Hubbard at 55).

The "Fair Game" doctrine, is a reprehensible practice judicially recognized as such:

> " 'Fair Game' like the 'inquisition' targeted 'heretics' who threatened the dogma and institutional integrity of the mother church. Once 'proven' to be a 'heretic', an individual was to be neutralized. In medieval times neutralization often meant incarceration, torture and death. As described in the evidence of this trial the 'fair game' policy neutralized the 'heretic' by stripping this person of his or her economic, political and psychological power. (Internal citations omitted).

* * *

response to a complex, consolidated case which as of the date of the referral order had been pending for four and one half years, involved multiple party plaintiffs and defendants, counter-claims and counter-defendants, and which had been stalled by Petitioners' discovery recalcitrance and needless multiplication of proceedings, the district court ordered a limited referral of discovery and pre-trial matters to a special master so that the case could be more actively supervised and managed. Three and one half years later Petitioners' amended complaints have been dismissed, and the recovery of attorneys fees was awarded to Party Respondents as a direct result of Petitioners' flagrant violation of court orders and protracted discovery misconduct. (Dist. Ct's. Order Granting Attys' Fees, 2/24/93) (attached at (28a) to the Petition).

When Petitioners initially challenged the reference before the court of appeals, not only did Judge Ideman file a response supporting the reference, but also, he was joined by both the district court judge who previously had presided over the case (the Hon. Mariana Pfaelzer) and the magistrate who previously had been assigned discovery matters (the Hon. Volney V. Brown, Jr.), as well as by the Special Master (the Hon. James G. Kolts) (1a-16a).[5]

> We are not certain a deliberate campaign to financially ruin a former member or the dishonoring of debts owed that member qualify as 'religious practices' of Scientology. But if they do, we have no problem concluding the state has a compelling secular interest in discouraging these practices. Accordingly, we hold the freedom of religion guarantee of the United States and California Constitutions do not immunize these practices from civil liability for any injuries they cause to 'targets' such as Wollersheim."

Wollersheim v. Church of Scientology, 212 Cal.App.3d 872, 88-889, 891 280 Cal.Rptr. 331 (1989), *modified*, 15 Cal.App.4th 1426, 6 Cal.Rptr.2d 532 (1992), *review granted*, 10 Cal.Rptr.2d 182 (Cal. July 23, 1992), *and review dismissed, case remanded to Ct.App.* (July 15, 1993).

[5]Party Respondents did not object to the reference to a special master, but only the Court's decision to apportion the cost of the special master among the parties. The Party Respondents argued that since the reference was necessitated by Petitioners' misconduct, they should incur

The decision to appoint a special master marked a turning point in this litigation. As a result, the logjam which had been erected was broken and this case started moving forward again. Hearings were conducted, transcripts of proceedings were maintained and recommendations were issued by the Special Master, all subject to the *de novo* review of the district court.

Like many other judges, Judge Ideman typically does not conduct oral argument unless he requests it or the parties can demonstrate it is necessary. With that practice in mind, Petitioners routinely filed extensive motions for review before the district court accompanied by the complete record of the proceedings before the Special Master. Rather than identifying any alleged mistakes of law or fact, however, Petitioner' motion practice was characterized by repetitive reargument.

In some instances, Petitioners merely *repeated and re-argued* what had been presented repeatedly to the *Special Master:*

> "Plaintiffs have conceded that this motion was not filed due to the emergence of new law or facts. It is also clear that this motion was not filed due to a manifest showing of the failure to consider material facts previously presented to the court. Rather, this motion was filed due to an incorrect and unreasonable assumption that the Special Master's disagreement with plaintiffs' interpretation of the law and facts necessarily arises from his fundamental misunderstanding of the law and facts. This simply is not a basis for reconsideration under Rule 7.16. As such, the filing of the instant motion was patently unreasonable and sanctions are in order."

(Special Master's Memo. Opin., 7/2/91, at 4). (19a). In such instances, the district court had the "benefit" of an expanded record generated by Petitioners' repetitive motion practice.

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the costs for the Special Master. The district court responded by requiring the parties to share costs initially subject to re-allocation at a later time. To that end, the district court subsequently ordered Petitioners to reimburse the Party Respondents for their share of the Special Master fees as a recoverable cost following the dismissal of Petitioners' two amended complaints.

In other instances, Petitioners repeatedly *re-argued* matters before the *district court:*

> "The Plaintiffs' motion for reconsideration of the Court's April 27, 1990 order adopting the April 3, 1990 discovery order of the Special Master is hereby DENIED.
>
> * * *
>
> The Plaintiffs have made no showing at all of the Court's failure to consider material facts or issues. When the Court adopted the Special Master's order, the Court concluded that none of the Plaintiffs' objections had merit. The Court did however, comment on the areas where it thought some additional guidance was required. No additional comment by this Court was required since it adopted all of the Special Master's findings and orders. What the Plaintiffs are alleging by this motion is that the Court did not read all of the Plaintiffs papers. *The Plaintiffs can be assured that the Court read and carefully considered all of their objections.* As a whole, the Court found them without merit and agreed with the Special Master's findings and order." (Emphasis supplied)

(Dist. Ct.'s Order, 8/20/90, at 2-3). (21a-22a)[6]

Moreover, in yet other instances both before the Special Master and the district court, Petitioners *re-argued* issues *already decided* in the case. For example, by the time the district court issued an order upon review the issue would have been the subject of prior orders of Judge Pfaelzer, and/or recommendations of the Special Master adopted by the district court. Accordingly, in several instances the district court concluded on the frequently duplicative record before him that the Petitioners' motions had no basis in law or fact for the same reasons set forth in the Special Master's recommendations.

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[6]Significantly, among others, the Petitioners failed to provide in its Appendix copies of either the Special Master's Memorandum Opinion or the district court's order cited above in the text.

The Petition does not identify a situation deserving of the extraordinary application of certiorari jurisdiction and is not a legitimate constitutional debate over a Rule 53 reference. As shall now be seen, the court of appeals appropriately declined to invoke mandamus jurisdiction and the district court acted well-within Constitutional prescribed parameters.

REASONS FOR DENYING PETITION

I.

THERE IS NO SPLIT AMONG THE CIRCUITS: IN THE NINTH CIRCUIT MANDAMUS IS AVAILABLE IN APPROPRIATE CASES TO REVIEW A REFERENCE TO A SPECIAL MASTER

Petitioners construct a strawman when they contend that under the Ninth Circuit's test articulated in *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977): "mandamus almost certainly would not be available to correct . . . a usurpation of or failure to exercise jurisdiction." (Pet. at 15). In an *appropriate* case, mandamus *is* most decidedly available in the Ninth Circuit to review the scope of a district court's reference to a special master, a principle established by reference to the very authority cited by Petitioners on unrelated grounds.

In *National Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536 (9th Cir. 1987) (Pet. at 15) a Ninth Circuit panel had that very issue before it. The court of appeals, cognizant of its authority and responsibility as stated in *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256, 77 S.Ct. 309, 313, 1 L.Ed.2d 290 (1957), demonstrated the flexibility inherent in the *Bauman* test and balanced the "conflicting indicators" present in the case before it as to the propriety of a referral pursuant to Federal Rules of Civil Procedure, Rule 53. In that case, where two of the five indicators were not present, it was concluded, nevertheless, that mandamus jurisdiction would be exercised *if* the order appointing the special master was clearly erroneous as a matter of law. Upon such consideration, the court of appeals concluded that the reference was not clearly erroneous and, therefore, the petition for writ of mandamus was denied. In so doing, the Ninth Circuit noted that,

specifically contrary to Petitioners' observations, its approach was consistent with other out of circuit cases such as *In re United States*, 816 F.2d 1083 (6th Cir. 1987).

Having disposed of the attention getting device of identifying an ostensible "conflict among the circuits", it also is apparent Petitioners were provided with a receptive forum by the Ninth Circuit. Prior to taking any action, the court of appeals requested responses from the Party Respondents and the district court. Only then, after Petitioners made a woefully inadequate effort to comply with the showing necessary under *Bauman*, did the court of appeals decline to assert mandamus jurisdiction. Indeed, Petitioners now tacitly concede that they have made no showing why this is *the* type of extraordinary case warranting the sparingly applied remedy of mandamus. (Pet. at 14-15).

II.

NOTWITHSTANDING THE AVAILABILITY OF MANDAMUS IN APPROPRIATE CIRCUMSTANCES, THE NINTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THIS CASE DID NOT SO QUALIFY

A. A Writ of Mandamus Is A Drastic Remedy Only Available In Extraordinary Situations

Appellate jurisdiction for consideration of a writ of mandamus is predicated on the All Writs Act, codified at 28 U.S.C. § 1651(a), which empowers Federal Courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and as agreeable to the usages and principles of law." From this statutory authority, appellate courts have developed the concept of "supervisory mandamus" enabling an appellate court to supervise the administration of a lower appellate or trial court. *See La Buy v. Howes Leather Co.*, 352 U.S. at 256, 77 S.Ct. at 313, 1 L.Ed.2d 290.

Concurrent with the authority of an appellate court to issue a writ of mandamus, is judicial recognition of the inherent preemptive nature of such action and the effect of granting such writs have on the administration of the lower courts including: (1) the

potential destruction of fair and prompt administration of justice by facilitating piecemeal litigation, *See, Kerr v. United States Dist. Court for Northern Dist. of California*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725, 732 (1976); (2) the subversion of the finality rule and/or disruption of the carefully delineated congressional scheme concerning matters reviewable by interlocutory appeals, *see Bauman v. United States Dist. Court*, 557 F.2d at 653; and (3) undermining the mutual respect between trial and appellate courts by creating the potential for substitution of the judgment of the reviewing court, *Id.*

In light of these policy considerations the remedy of mandamus is considered drastic and requires a showing of extraordinary circumstances to justify its issuance. This Court has observed:

> "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations . . . As we have observed, the writ 'has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so'. . . . And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes the matter of 'jurisdiction', the fact still remains that 'only exceptional circumstances amounting to a judicial usurpation of power' will justify the invocation of this extraordinary remedy." (Citations omitted).

Kerr, 426 U.S. at 402, 96 S.Ct. at 2123-2124, 48 L.Ed.2d at 732. *Accord, Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).

B. The Law As Applied By The Ninth Circuit

In recognition of the potential disruption of the orderly administration of justice through unrestrained issuance of writs of mandamus, the Ninth Circuit has sought to create *guiding and limiting principles* to assess the propriety of requests for such extraordinary relief. *Bauman*, 557 F.2d at 653.

In *Bauman*, a detailed review of pertinent decision of this Court and prior Ninth Circuit decisions revealed the following

guidelines for issuance of preemptive writs such as mandamus: (1) petitioner has no other adequate means, such as direct appeal, to attain the requested relief; (2) petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the District Court's order is clearly erroneous as a matter of law; (4) the District Court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and (5) the District Court's order raises new and important problems or issues of law of first impression. *Bauman*, 557 F.2d at 654-655.

While the presence or absence of such guidelines or factors must be considered individually, all factors must be considered *cumulatively* through a weighing or balancing process (with conflicting factors thereby reconciled), *Bauman*, 557 F.2d at 655; and the appellate court must determine the "extent to which the case before the court does or does not conform with the guidelines." *National Org. For The Reform of Marijuana Laws v. Mullen*, 828 F.2d at 542.

As demonstrated herein, the factor by factor review required by *Bauman* serves only to highlight Petitioners' failure to establish their right to the extraordinary relief requested.

1. Petitioners Must Establish No Other Means Of Redress

An order of reference to a special master pursuant to Federal Rule of Civil Procedure 53(b) is generally recognized as a interlocutory order and is therefore not appealable except as assignable error from a final judgment. *See* 28 U.S.C. 1292(a); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 291, 61 S.Ct. 229, 234 n.4, 85 L.Ed. 189, 195 (1940) and *National Org. For The Reform of Marijuana Laws*, 828 F.2d at 540.

Since the District Court's Order appointing the Special Master is not an appealable interlocutory order, mandamus relief *may* be appropriate *provided* such extraordinary relief is merited by a review of the remaining factors. *Bauman*, 557 F.2d at 656 (extraordinary relief denied where only one of five factors established and/or where the remaining factors indicate relief is inappropriate).

2. Petitioners Must Demonstrate They Will Be Damaged In A Manner Not Correctable On Appeal

The petition for mandamus before the court of appeals did not contain any specific assertions of prejudice, or damage not remediable by an appeal from final judgment. As one court of appeals most recently held in denying a writ of mandamus seeking to vacate a reference to a special master:

> "Mandamus is an extraordinary remedy which 'should be dispensed sparingly and only in pursuance of the most carefully written prescription, not made available over the counter, on casual demand. It is not a substitute for interlocutory appeal.' *Recticel*, 859 at 1005. In its present posture, this case does not warrant a dose of such strong medicine. The record here is, for the most part, malady-free; and any symptoms of arguable error, if later shown to have blossomed into full blown diseases, are amenable to a traditional cure on direct appeal."

In Re Pearson, 990 F.2d 653, 661-662 (lst Cir. 1993). This factor therefore supported denial of the petition.

3. Petitioners Must Show That The Order Constitutes Oft-Repeated Error

Some decisions have suggested in assessing this factor that, for purposes of legal analysis, the District Court's order should be considered erroneous and thereafter a determination made as to whether this type of error is "often repeated." *See Merle Norman Cosmetics, Inc. v. United States Dist. Court, Cent. Dist. of California*, 856 F.2d 98 (9th Cir. 1988); *In re Cement Antitrust Litigation (MDL No. 296)*, 688 F.2d 1297, 1303-1304 (9th Cir. 1962), *aff'd mem. sub. nom. Arizona v. United States Dist. Court*, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983), opinion supplemented, 709 F.2d 521 (9th Cir. 1983).

Petitioners, however, make no showing at all regarding under what circumstances the district court previously have referred matters to special masters. Certainly the repetitive referral of an entire class of cases such as all antitrust cases as present in *La Buy*, is *not* established. Moreover, this Court has indicated *La*

Buy's approval of the revocation of a reference to a master "is simply inappropriate where there is no showing of a persistent disregard of the federal rules" (i.e., a *pattern* of *improper* references of *cases* to special masters by the District Court). *Will v. United States*, 389 U.S. 90, 95, 104 n.14, 105, 88 S.Ct. 269, 270, 19 L.Ed. 305 (1967); *Accord, In re United States Department of Defense*, 848 F.2d 232, 237 (D.C. Cir. 1980). This factor consequently also supported denial of the petition.

4. Petitioners Need to Establish That The Petition Raises New And Important Problems Or Issues Of Law of First Impression

Assignments to a special master are adjudicated on a case by case basis pursuant to the provisions of Federal Rule of Civil Procedure 53. *See, Bauman*, 557 F.2d at 655 ("... rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable.") and *Arthur Murray Inc. v. Oliver*, 364 F.2d 28, 32 (8th Cir. 1966) ("Every reference to a master, no matter what the litigation incident involved may be, and regardless of what may be the form or scope of the task sought to be referred, is within the application of the Rule.") Accordingly, although the facts may be different, no new or novel issues of law or first impression are posed by petitioners' application and, as such, this factor similarly supported denial of the petition.

5. Petitioners Must Establish That The District Court's Order Is Clearly Erroneous As a Matter Of Law

Perhaps of all the guidelines set forth in *Bauman* no other single criterion is as important in determining whether mandamus relief is appropriate as the determination of whether or not the District Court's Order was clearly erroneous as a matter of law. *See, Seattle Times v. United States Dist. Court For Western Dist. of Washington*, 845 F.2d 1513, 1515 (9th Cir. 1988) and *Christensen v. United States Dist. Court for Cent. Dist. of California*, 844 F.2d 694, 697 (9th Cir. 1988) ("The *key factor* to be examined is whether we are firmly convinced [the] district court erred...") (Emphasis supplied); *see also, Merle Norman Cos-*

metics, Inc., 856 F.2d at 100 ("A *highly significant*, although not always dispositive, criterion is whether the district court's order . . . is clearly erroneous as a matter of law.") (Emphasis supplied)

In this instance, the issue is whether the district court "abdicated its judicial responsibilities by the referral to a special master of limited pre-trial and discovery related matters, while reserving to itself ultimate decision making authority. (Rule 53(b), F.R.Civ.P.). In undertaking this analysis, the Ninth Circuit has adopted the "firm conviction" test to assist in determining whether a district court's interpretation of a statute is clearly erroneous as a matter of law:

> ". . . [W]e will characterize a ruling of the district court on a question of law as 'clearly erroneous' only when, after a full review of the authorities, we are *firmly convinced* that the district court's interpretation was incorrect" (Emphasis supplied).

In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d at 1306. As shall now be seen, a full review of the authorities indicates that the District Court did not err in the manner in which it exercised its reserved power to review the recommendations issued by the Special Master.

III.

THE DISTRICT COURT'S REFERRAL ORDER TO THE SPECIAL MASTER SHOULD NOT BE VACATED

A. *The Initial Referral Order Was Appropriate*

The district court identified several reasons upon which it based its decision to appoint a special master:

1. The *complexity* of the litigation involving RICO, Federal Trademark and Service Mark Infringement, the Sherman Act, the Copyright Act, various pendent state claims and numerous counter-claims;

2. The *number* of *parties* to the litigation;

3. The large *number* of *motions, motions for reconsideration and appeals*;

4. The *disproportionate amount of time and resources* the Court had to donate to this case to the detriment of other litigants;

5. The need to reduce the *estimated three month trial time*;[7] and

6. The pendency of the case since 1985. (Order, 9/13/89, at 1-3).

It was not until waiting six months following the appointment of the Special Master, and only after participating on the merits in proceedings before the Special Master and the receipt of a ruling dismissing their RICO claims, that Petitioners sought by way of a petition for writ of mandamus to the Ninth Circuit Court of Appeals to remove the Special Master in April, 1990. Pursuant to the court of appeals' request, written responses were filed by the district court judge then presiding over the case (the Honorable James M. Ideman), the district court judge formerly presiding over the case (the Honorable Mariana R. Pfaelzer), the assigned magistrate judge (the Honorable Volney V. Brown), and the special master (the Honorable James G. Kolts) (all submitting declarations to the effect that an exceptional condition existed warranting the appointment of a special master), and the Party Respondents.

In its response, the district court indicated that the Special Master "is now thoroughly familiar [with the case], much more so than anybody else." (4a). Moreover, neither the district court, nor the magistrate, had the time necessary to contend with the ever expanding issues which have arisen in the case. As a result, the district court concluded that it was "critical that the [appellate court] deny the writ of mandate so that the Special Master can continue his work." (5a). The magistrate added that: "contrary to the implication that the case was nearly ready for trial

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[7]As a result of the Special Master's efforts, at a hearing before the district court on November 29, 1993, the parties estimated a *two week* trial time.

when the Special Master was assigned . . ., discovery appeared to me to be as far from concluded as it was when the case was initiated in 1985." (11a). The magistrate concluded that this case "is indeed complex, burdensome and time consuming" (*Id.*) The comments of the magistrate mirrored Party Respondents' frustration in dealing with an adversary who has a policy of using litigation as a weapon.

In light of the reasons set forth by the district court, it was apparent that the referral to the Special Master was warranted in response to the "exceptional condition" which confronted the Court and was *not* clearly erroneous as a matter of law. The petition for writ of mandamus seeking to vacate the reference was denied on June 27, 1990.

This Court has cited reasons similar to those listed by the District Court in concluding that reference to a special master was necessary and appropriate. Thus, for example, the burden of a case on the court's calendar, already congested with criminal matters which have priority and other civil matters which require a fair apportionment of the court's time, was cited by this Court in denying a petition for mandamus to vacate a reference to a Special Master in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 47 S.Ct. 286, 71 L.Ed 451 (1927). For similar reasons, utilization of a magistrate in this case is unfeasible. As Magistrate Brown stated in his Declaration, the demands placed upon his time as a result of this case was "intolerable." Under such circumstances "masters may prove useful . . . when a magistrate is unavailable for lengthy and detailed supervision of a case." Rule 53, F.R.Civ.P. *Notes of Advisory Committee On Rules*, 1983 Amendment, Subdivision (a). *See also, Eggleston v. Chicago Journeymen Plumbers*, 657 F.2d 890, 904 (7th Cir. 1980), *cert. denied*, 445 U.S. 1017, 102 S.Ct. 1710, 72 L.Ed.2d 134 (1982) ("The designation of a magistrate . . . while also viable, is a less satisfactory alternative as magistrates have numerous other duties . . .").

Now, three and one-half years later, Petitioners are back again arguing the order of reference and every order ostensibly adverse to them must be vacated notwithstanding that it was *their* litigation misconduct which has resulted in dismissal of their

complaints and imposition of monetary sanctions. In response to the court of appeals' request, the district court filed another declaration in connection with the underlying petition for writ of mandamus before the Ninth Circuit. At that time, the district court identified the real motivation behind Petitioners' challenge to the referee:

> "Plaintiffs are unhappy with Judge Kolts and me for insisting that they comply fully with discovery or forfeit their case. For this reason they wish to have our work set aside and begin anew with another judge who may, they hope, permit them to litigate their claims without complying with discovery, or, perhaps, to further punish the other parties with more years of expensive litigation. This they should not be permitted to do, especially by means of the limited review possible on an extraordinary writ."

(Declaration of the Hon. James Me. Ideman, 6/17/93, at ¶ 7). (24a, 25a).

Party Respondents submit that the court of appeals was right *again* when yet another panel subsequently denied for a *second* time Petitioners' petition for writ of mandamus seeking to vacate the reference to the Special Master and, for the additional reasons set forth below, the Court should deny the Petition for Certiorari.

B. The Reference Has Been Appropriately Conducted

1. The Scope Of The Reference Is Constitutionally Sound

As the linchpin for their entire argument, Petitioners contend that the district court acted improperly by referring this case to a special master "essentially for all purposes." (Pet. at 5). However, that is not an accurate description of the district court's referral order. This was not an all purpose reference. The Special Master was directed to hear and make recommendations regarding discovery and pre-trial motions. The district court reserved *to itself* the power to review all such recommendations and the actual trial of the case before a jury.

Accordingly, many of the authorities relied upon by Petitioners are substantively distinguishable. *La Buy v. Howes Leather Co.*,

involved a reference to a master *for trial; Burlington Northern Railroad Co. v. Department of Revenue*, 934 F.2d 1064 (9th Cir. 1991), also involved a reference to a master of the *entire case*;[8] *Stauble v. Warrob, Inc.*, 977 F. 2d 690 (1st Cir. 1992), similarly involved a reference to a special master for *trial on the merits*; and *In re Bituminous Coal Operator's Ass'n, Inc.*, 949 F.2d 1165 (D.C.Cir. 1991), likewise involved a *blanket reference*, including *trial* of liability issues.

In one case however, *In re United States, supra*, a more limited reference, involving a reference to a special master to review and submit recommendations on motions for summary judgment and other potentially dispositive motions was partially vacated. In that case, the court of appeals noted the distinction drawn by other courts between referring a trial to a special master and referring pre-trial matters, but concluded that dispositive motions should not fall on the pre-trial matters side of the line. *Id.* at 1091.

The Ninth Circuit, however, has not adopted the Sixth Circuit's reasoning in this regard. Instead, the Ninth Circuit has followed the approach utilized by the Eighth Circuit as set forth in *In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985) (*per curiam*):

> "We believe that the district court erred in granting the master authority to preside at trial on the merits of this case. We also believe, however, that the district court acted properly in granting the master the broad authority to supervise and conduct pretrial matters, including discovery activity, the production and arrangement of exhibits and stipulations of fact, the power to hear motions for summary

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[8]The *Burlington* case also stands for the proposition that *upon a proper showing* the Ninth Circuit will vacate a demonstrably improper reference to a special master *prior to appeal from a final judgment.* In *Burlington*, the court of appeals held even though an erroneous referral to a special master may not of itself constitute reversible error (citing *Adventures in Good Eating v. Best Places To Eat*, 131 F.2d 809 (7th Cir. 1942) (court of appeals may review and uphold master's findings even if reference was initially improper), where significant litigation issues remained to be decided an improper reference order (referring all matters, including trial on the merits) should be vacated.

> judgment or dismissal and to make recommendations with respect thereto."

Id. at 105. *Accord*, the Ninth Circuit's decision in *Burlington Northern Railroad Co. v. Department of Revenue*, 934 F.2d, at 1073 ("*In re Armco* similarly distinguished between properly letting a master hear and make recommendations on pretrial motions (summary judgment and dismissal) and improperly letting him preside at trial.")

Petitioners' argument that the district court's referral order ran afoul of Article III of the Constitution is not persuasive when, as here, the district court reserved to itself ultimate decision making authority and, in fact, implemented that authority. *United States v. Conservation Chemical Co.*, 106 F.R.D. 210, 233 (W.D. Mo. 1985) was the same case subsequently reviewed as *In re Armco Inc., supra.* To the extent the referral to a special master was approved it was because the district court, as here, addressed the limitations imposed by Article III:

> "The decisions in [*Northern Pipeline Const. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932); *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) and *Lehman Brothers Kuhn Lo, Inc. v. Clark Oil & Refinery Corp).*, 739 F.2d 1313 (8th Cir. 1984)] make it clear that delegations of authority do not violate Article III so long as the essential attributes of power remain vested in the Article III court. There is no requirement that all factual determinations be made by Article III judges in order to maintain the essential attributes of judicial power. Although waiver by consent may be one factor in determining whether Articles III guarantees are satisfied, consent is not necessary if there are sufficient limitations on the adjunct and if the ultimate decision making authority clearly remains with the District Court."

In *United States of America v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990), on *appeal* (not a petition for writ of mandamus) of a *trial reference* to a special master (as opposed to the more limited reference of discovery and pre-trial matters

involved in this case), the Ninth Circuit had occasion to decide whether an exceptional condition existed warranting the appointment of a special master. In concluding that such conditions existed warranting the referral to a special master, the Ninth Circuit relied upon the fact that the case was comprehensive and complex involving numerous supplemental proceedings and voluminous filings. Rejecting the argument that only complex cases qualify for reference to a special master, the court of appeals held:

> "The Suquamish assert that a question may be referred to a Special Master only when it is complex or involves special expertise. This contention is without merit. The district court may refer a matter to a master when 'exceptional conditions' are present in the case, not when the matter is itself exceptional."

Id. at 775, fn.6. In addition to the presence of such factors as complexity, size and multiple parties, this case had the unique presence of Petitioners' expressed policy of using litigation as a weapon to harass rather than to win. Under these exceptional circumstances, the appointment of a special master to help stem the abuse as both necessary and appropriate, was not clearly erroneous as a matter of law.[9] *See also, In re Thornburgh*, 869 F.2d 1503, 1508 (D.C. Cir. 1989):

> "Indeed, absent the *La Buy* problem of 'untoward or irretrievable delegation of judicial authority,' this court has been reluctant to 'interfere [ ] with [a district judge's] trial management by issuing a mandamus writ ordering that a special master reference be vacated.' "

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[9]Petitioners' citation to *Prudential Ins. Co. of America v. U.S. Gypsum Co.*, 991 F.2d 1080 (3rd Cir. 1993) is distinguishable. In that case the court of appeals found an *absence* of the exceptional circumstances necessary to give rise to a need for a special master, as opposed to use of a Magistrate. By contrast, in this case the district court submitted declarations of the two district court judges and the magistrate judge who previously had been assigned to the case, all concurring in the need to appoint a special master.

2. The District Court Has Not "Rubber-Stamped" The Recommendations Of The Special Master

Petitioners also contend that the district court's adoption of the Special Master's recommendations constitutes abdication of judicial responsibility because the district court's orders were too concise for their liking. Again, however, in support of their argument Petitioners resort to such cases as *Burlington Northern* and *Stauple*, both of which involved references to special masters for trials on the merits.

Moreover, also distinguishing this case from those cited by Petitioners, the briefing and record before the district court on the motions for review have been extensive. In many, if not all, transcript of hearings conducted before the Special Master were provided to the district court and counsel for both sides identified every conceivable relevant argument and fact to the district court before it issued its rulings. [10]

However, it was readily apparent that Petitioners' motions for review (constituting the overwhelming majority of such motions before the district court) were repetitive and merely re-argued what was said below in proceedings before the Special Master. Given the fact that the Special Master is a retired state court judge with twenty years experience on the bench, including appellate experience setting by designation, his opinions were, in large measure, cogent and well-reasoned. Accordingly, upon review, the district court did not have to re-invent the wheel when it drafted orders indicating that Petitioners' motions were not well-based in fact or law. *Cf. Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 712 (7th Cir. 1984) a case cited by Petitioners, where the court of appeals was reluctant to, and did not, vacate a referral order, *inter alia*, because the district court approved a special master's opinion rather than writing his own.

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[10]Thus, as the court of appeals noted in *Stauble*:

> "A judge may, of course, refer the fundamental issue of liability to a master without running afoul of the Constitution, so long as the judge is prepared to afford *de novo* review or otherwise to honer Article III's commands."

Stauble v. Warrob Inc., 977 F.2d at 698 n.13.

Moreover, in the opinions issued by the district court (most were written by the district court, only a few adopted the Special Master's recommendations without additional explanation), the reasons for the decisions were clearly discernable. It is also noteworthy that when Petitioners sought clarification of an order or moved for reconsideration, the district court invariably obliged them. Contrary to Petitioners' argument that the orders were too oblique, Petitioners knew exactly what the district court meant. Petitioners' actual argument is that they did not like the result, but that provides no ground for vacating the reference.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be denied.

Dated: December 3, 1993

Respectfully submitted,

JEROLD FAGELBAUM
LAW OFFICES OF JEROLD FAGELBAUM
2029 Century Park East, Suite 3270
Los Angeles, California 90067
(310) 286-7684

GARY M. BRIGHT
BRIGHT & POWELL
5464 Carpinteria Avenue, Suite E
Carpinteria, California 93013
(805) 684-8480

APPENDIX A

APPENDIX A-1

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RELIGIOUS TECHNOLOGY CENTER, et al., *Petitioners,* *vs.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *Respondent,* and DAVID MAYO, et al., *Real Parties in Interest.*	No. 90-70176 DC # CV-85-711-JMI (Bx) DC # CV-85-7197-JMI (Bx)

DECLARATION OF JAMES M. IDEMAN

I, James M. Ideman, hereby declare:

1. I am a judge of the United States District Court, Central District of California. This Court has requested a response by the District Court. My declaration, together with the declarations of Judge Pfaelzer, Magistrate Brown and Special Master Kolts, attached hereto as Exhibits A, B and C, respectively, constitutes such response.

2. Transfer of the Case To Me

On May 24, 1989, these cases were transferred to me from Judge Pfaelzer. At the time of the transfer, I conferred with Judge Pfaelzer and Magistrate Brown and their staffs. They advised me that the tremendous demands placed upon them by these cases had seriously affected their ability to handle their other caseload. Among the matters of which they advised me were the following: The docket entries (attached to Judge Pfaelzer's declaration) showed five-hundred and thirty (530) separate docket entries. As may be expected, such enormous

activity produced a huge file. This file at the time was in ninety (90) volumes. We had to clean out an entire storeroom in order to find a place to physically house this file. It alone, weighing hundreds of pounds, occupies the entire storeroom. Even to attempt to read the file would take months if one had nothing else to do.

They told me that essentially similar matters were pursued repeatedly but always with a somewhat different twist that required the expenditure of more judicial time, and, like cutting off the head of a hydra, each judicial decision seemed to spawn a half-dozen spin-off disputes. Counsel were so antagonistic to each other that court appearances would often become protracted shouting matches and at least one fist-fight occurred between counsel, either in the courtroom or immediately outside.

Contrary to plaintiffs' statement which gives the impression that discovery was essentially completed, this was far from the case. Numerous motions were pending before Magistrate Brown, as well as six (6) discovery motions. Magistrate Brown stated that if he were to stay on the case, he would be able to handle little or nothing else.

Five years into the litigation, summary judgment motions are still being brought, as well as other motions. Indeed, between November 1, 1989 and April 30, 1990, the Special Master has spent 113½ hours and his law clerk has spent 111 hours on this case, a figure which Judge Pfaelzer and I both regard as eminently reasonable.

3. Referral to the Special Master

As an active district judge with a full civil and criminal calendar, as is Judge Pfaelzer, I quickly realized that I could not fulfill my responsibilities to my other cases and the litigants and attorneys in those cases if I did not find a way to reduce the demands of this case on the system. I therefore decided early on to refer the matter to a Special Master. That reference was not made until September 1989, however, for the reason that it was difficult to find a judge willing to handle this case, since the propensity of the parties and attorneys to engage in bitter and protracted litigation is well-known to the local bench and bar.

After Judge Kolts agreed to accept the assignment, I made the reference to him on September 12, 1989. It is true that I did not consult the parties in advance, but I felt that would be a useless act since they had never agreed on anything else and I did not expect them to agree to this either. However, in case there was some valid reason that had escaped my attention why the reference should not be made, or if there was some particular objection to Judge Kolts, I gave the parties a chance to file written objections, which they did on September 22, 1989. On October 12, 1989, I confirmed my reference to Judge Kolts as Special Master.

4. The Dismissal of the RICO Claims

Plaintiffs waited almost six (6) months from the date that I confirmed the reference to the Special Master, October 10, 1989, before applying for this writ. They applied for the writ only a few weeks after the Special Master had recommended dismissal of the RICO claims. It thus appears to me that the event which triggered the application for the writ was not the reference to the Special Master, but the Special Master's recommendation that their RICO claims be dismissed.

Plaintiffs should understand that the Order to Show Cause re RICO claims is routine in these chambers, and is done in each case where RICO claims are made. I, and a number of other judges of this Court, have found that a great number of RICO claims are ultimately found to be without merit and their retention in the case complicates case management, makes settlement difficult and unnecessarily prolongs trials. Thus, a form was developed and counsel are required to justify their claims. Most RICO claims do not survive this process and are eliminated from the case at a relatively early time. The only difference in this case was that the claims were subjected to the scrutiny of two judicial officers, Judge Kolts and myself, instead of only myself. Contrary to the assertion that Judge Pfaelzer had previously ruled that the RICO claims were valid, this is not so. Judge Pfaelzer does not have a policy of issuing an Order to Show Cause re RICO claims and so a clear ruling was never requested nor made. Even if such a ruling had been made, I would be free, as the trial judge, to

change such ruling, just as Judge Pfaelzer could have changed her mind, but that was not the case.

5. The Cost of the Special Master

It is true, of course, that the parties are paying the cost of the Special Master. First, the parties are well able to bear this expense. Secondly, the parties will find that eventually the Special Master has produced a considerable savings for them and is a bargain. At the time I received the case, the documents revealed that the understanding of the parties was that the trial would be an open-ended affair lasting many months or even years. That, of courage, is intolerable and I have directed the Special Master, as one of his most important duties, to conduct such pre-trial conferences as may be necessary to shorten the trial time required by use of stipulations as to uncontested matters, winnowing of witnesses and exhibits, exclusion of inadmissible or repetitive material and such. If he can do this, and I am sure that he can, the parties will save a fortune in litigation expense.

In addition, plaintiffs claim that Magistrate Brown has a thorough knowledge of the case, whereas the Special Master is a stranger to it. This might have been so when the reference was first made, but with the passage of time, Magistrate Brown has forgotten a great deal about the case, as he states in his declaration, and Judge Kolts is now thoroughly familiar with it, much more so than anybody else.

6. Conclusion

I am responsible for approximately two-hundred seventy (270) other civil cases and some two or three dozen criminal cases, and my staff and I have obligations to the parties and attorneys involved in these cases. Magistrate Brown and his staff also have obligations to their caseload. The demands of the instant cases before this panel of the Court of Appeals require an amount of time that I do not have, and that Magistrate Brown does not have.

I consider it critical that this Court deny the writ of mandate so that the Special Master can continue his work.

Dated: May 16, 1990

JAMES M. IDEMAN

JAMES M. IDEMAN
United States District Judge

EXHIBIT A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, a California corporation, et al., *Plaintiffs,* v. ROBIN SCOTT, an individual, et al., *Defendants.*	CASE NO. CV 85-711 JMI
RELIGIOUS TECHNOLOGY CENTER, a California corporation, et al., *Plaintiffs,* v. LARRY WOLLERSHEIM, an individual, et al., *Defendants.*	CASE NO. CV 85-7197 JMI

DECLARATION OF MARIANA R. PFAELZER

I, Mariana R. Pfaelzer, hereby declare:

1. I am a judge of the United States District Court, Central District of California. I was assigned cases Nos. CV 85-711 and CV 85-7197 from the wheel in 1985. On May 24, 1989, I transferred these cases to Judge James Ideman.

2. Attached hereto and marked as exhibit 1 to this declaration are the docket sheets for cases Nos. CV 85-711 and CV 85-7197. These docket sheets were prepared and maintained by my secretary while the cases were active on my calendar.

3. As the docket sheets and court files show, there was continuous activity of the most contentious sort over the entire period these cases were assigned to me. At the time I assigned the cases to Judge Ideman, the papers and exhibits in the files were voluminous and there had been countless hearings and conferences before the Court and the Magistrate. The cases had

virtually exhausted this Court's resources and those of the Magistrate assigned to the cases. As the transcripts of Court hearings will reflect, the atmosphere of the litigation was acrimonious, agreement could never be reached on even the most routine matters, and no issue was ever disposed of without generating further motions and proceedings retrying the same issues in a different form. For these reasons, at the time of the transfer to Judge Ideman, this Court had been considering the appointment of a Special Master to preside over the remaining discovery proceedings and motions and to conduct a pretrial conference in anticipation of trial of the cases.

DATED: May 15, 1990

MARIANA R. PFAELZER

Mariana R. Pfaelzer
United States District Judge

EXHIBIT B

UNITED STATES COURT OF APPEALS
CENTRAL DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, et al., *Petitioners,* v. DAVID MAYO, et al., *Respondents.*	CASE NO. CV85-711-JMI (Bx) DECLARATION OF VOLNEY V. BROWN, JR.

I, VOLNEY V. BROWN, JR. declare:

1. I am a United States Magistrate at Los Angeles. When the within action was originally filed, the Clerk drew Judge Pfaelzer's card as trial judge and my card as discovery Magistrate. By assignment of Judge Pfaelzer and later of Judge Ideman, I was the judicial officer ordinarily and regularly assigned to resolve discovery disputes from inception to September, 1989, when Judge Kolts was assigned as Special Master.

2. I am one of eight United States Magistrates at Los Angeles. Every eighth week, on average, I am the Criminal Duty Magistrate, and during this period all of my time, often including time in the evenings and on the weekend, is devoted to criminal matters. During the remaining seven weeks, I estimate that 35% of my time is devoted to adjudicating discovery disputes, 10% is devoted to settling cases, and the remaining 55% is devoted to adjudicating social security, prisoners, and *pro per* civil rights actions and habeas corpus petitions. I am regularly assigned to District Judges' committees and, as well, as the District Court Historian and Disaster Director at the Court House.

3. The attorneys in this action are unusually contentious. They appear to deny each other the most basic and ordinary professional courtesies, and to bring and prosecute motions for the purpose, *inter alia,* of inflicting work and expense on the other side. They have had the propensity of appealing significant rulings of mine to the District Judge, so that he/she must also expand much time thereon. I estimate that during protracted periods to 1989, their motions claimed more of my time than all of the other

scores of discovery matters assigned to me combined. I have never had a case for discovery which was even nearly so burdensome.

4. It is true that at one time I retained in my mind a number of significant facts concerning the case. This, however, is no longer true; I can now recall only the broadest outlines of the matter. Judge Kolts, one of the judicial officers who have been involved in the case, almost certainly now has the greatest factual knowledge of it.

5. I believe that it was at least partly at my instance that Judge Ideman appointed a Special Master. The burden of this case upon my time had become intolerable. I was forced to delay adjudication of numerous cases assigned to me, including some probably meritorious habeas corpus, Social Security and civil rights cases. Any lawful and just expedient should be adopted to assure that persons are not improperly incarcerated, needy people are not denied Social Security benefits and constitutional rights are not violated. The assignment of the Special Master has permitted me to cut my backlog and to address my own cases promptly.

6. It may be true that I have not complained of the complexity of the case (Motion, pp. 18-19), but it is indeed complex, burdensome and time-consuming. Issues do not stay resolved, but are endlessly presented in different form and/or appealed. The matter cries out for the appointment of a stern Special Master who can give it the very considerable time necessary to ready it for trial.

7. Contrary to the implication that the case was nearly ready for trial when the Special Master was assigned (Petition, page 12), discovery appeared to me to be as far from concluded as it was when the case was initiated in 1985. There were some six discovery motions then pending before me, and my experience was that resolution of these would certainly spawn a new round of motions.

8. If the Court of Appeals holds that it is not lawful or appropriate to refer a case such as this to a Special Master. an important — indeed a nearly indispensable — relief valve will be denied the District Court.

9. The cases cited by petitioners, to the effect that the trial judge should conduct the discovery to learn the case, are inapposite. I will not in any event hear the case.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection.

DATED: May 11, 1990

VOLNEY V. BROWN, JR.

VOLNEY V. BROWN, JR.
United States Magistrate

EXHIBIT C

James G. Kolts
1715 East Altadena Drive
Altadena, CA 91001
(818) 797-4883
Special Master

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, a California Corporation, et. al., *Plaintiffs,* vs. ROBIN SCOTT, an individual, et. al., *Defendants,*	CV 85-711 JMI (Bx) CV 85-7197 JMI (Bx)
RELIGIOUS TECHNOLOGY CENTER, a California Corporation, et. al., *Plaintiffs,* vs. LARRY WOLLERSHEIM, an individual, et. al., *Defendants.*	DECLARATION OF JAMES G. KOLTS
AND RELATED COUNTER-CLAIMS	

I, JAMES G. KOLTS, hereby declare:

1. I am Special Master in the above matter appointed by the Honorable James Ideman, Judge of the District Court, Central District of California.

2. Said appointment was entered September 13, 1989.

3. At the time of my appointment, the following matters and motions were pending and to my understanding were to be disposed of in the order in which they appear:

a. Determine whether or not there were valid RICO claims filed by plaintiffs and counter-plaintiffs. b. Determine whether or

not the pendent claims filed by plaintiffs and counter-plaintiffs were valid. c. Plaintiff's motion for protective order re scheduling of depositions and discovery motions. d. Defendants' Mayo and Church of the New Civilization's motion for special setting. e. Six discovery motions.

(1) Defendant's motion to compel production of documents responsive to defendant's fourth request for documents.

(2) Defendant's motion to compel further production of documents and tapes responsive to defendant's second request for documents and sanctions.

(3) Defendant's motion to compel further production of documents by Church of Science Technology and Sanctions.

(4) Defendant's motion to compel production of documents responsive to subpoena duces tecum (Starkey).

(5) Plaintiff's motion for protective order.

(6) Plaintiff's motion for order rescheduling or limiting deposition of Joseph Yanny.

f. Plaintiff's motion to amend the complaint.

4. Declarant thereafter commenced an examination of records and submitted materials to determine an appropriate recommendation.

5. On January 9, 1990, declarant conducted a hearing with all interested parties represented.

6. At that time all of the parties present were offered an opportunity to argue and did so.

7. Declarant was and is of the opinion that the mandate of the District Court required the Special Master to determine the RICO and pendent claims questions on the then present state of the record.

8. Previous rulings on the RICO issues had been made from three to five years previous to this determination, and the posture of the case has changed considerably.

9. The issues presented at this time had not been directly, specifically and completely determined in earlier rulings, thus the need for the recommendation of the Special Master.

Dated: 5/10/90

/s/ JAMES G. KOLTS
JAMES G. KOLTS, Special Master

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, et. al., *Plaintiffs,* vs. ROBIN SCOTT, et al. *Defendants,*	CIVIL NOS. 85-711 JMI (Bx) 85-7197 JMI (Bx)
RELIGIOUS TECHNOLOGY CENTER, et. al., *Plaintiffs,* vs. LARRY WOLLERSHEIM, et. al., *Defendants.*	ORDER
AND RELATED COUNTERCLAIMS	

MEMORANDUM OPINION

I. PROCEDURAL HISTORY

Plaintiffs have moved pursuant to Rule 7.16 of the Local Rules of the United States District Court for the Central District of California for reconsideration of the Special Master's April 26, 1991 order imposing an issues sanction for failure to provide ordered discovery. Plaintiffs proffer two arguments in support of their motion. First, plaintiffs assert that the Special Master violated the law by imposing discovery sanctions without first holding a full-blown evidentiary hearing in which plaintiffs could cross-examine defendants' declarants. Second, Plaintiffs assert that the Special Master's failure to listen to the NOTs tapes constitutes "a manifest showing of a failure to consider facts presented to the court" thereby justifying reconsideration. *See* Local Rule 7.16(c). Defendants have opposed the motion and have crossmotioned for sanctions pursuant Rule 11 of the Federal Rules of Civil Procedure.

II. DISCUSSION

A. MOTION FOR RECONSIDERATION

Plaintiffs' argument that they were denied an evidentiary hearing has no basis in fact or law. Aside from a lack of authority for the novel assertion that a full-blown evidentiary hearing is required in every motion for sanctions, here a hearing was certainly not required in light of plaintiffs' failure to comply with the local rule governing requests to cross-examine declarants. *See* Local Rule 7.5.4 of the Rules of the United States District Court for the Central District of California.

Moreover, plaintiffs' poor excuse for their eleventh-hour requests to cross-examine Mayo and Strattman is not a proper basis for reconsideration of the order. Regardless of whether or not plaintiffs received a late reply brief, they waited to file their requests the day before the hearing. They did not apply to be relieved of compliance with the local rules, nor did they explain why they failed to file these requests so late. Indeed, plaintiffs appeared to abandon the issue when defendants' counsel pointed out their total disregard for the local rules. (RT 20-22). If plaintiffs so strenuously desired to have an evidentiary hearing, they should have requested one prior to the day before the scheduled hearing. They cannot now win reconsideration based upon their own non-compliance.

Plaintiffs' other argument is equally unavailing. The Special Master did not fail to consider material facts presented to the court. At the hearing, plaintiffs argued that they should not be sanctioned because the tapes were the sole basis for NOTs and they had already produced all existing tapes. (RT 36-47). The Special Master considered and rejected this argument in part because defendants' excerpted transcript of the tapes supported their assertion that written materials were also being used to create NOTs. It is important to note that plaintiffs were free to submit additional portions or the entire transcript in support of their opposition. They did not. They cannot now win reconsideration based upon their own previous omissions.

B. SANCTIONS

The Special Master now addresses whether the instant motion for reconsideration is sanctionable under Rule 11. Both parties to this litigation constantly accuse each other of acting in bad faith and this particular motion is no exception. The Special Master, however, declines to answer the ubiquitous bad faith question because bad faith is not the touchstone for the imposition of sanctions under Rule 11. *See Chambers v. NASCO, Inc.*, 1991 D.A.R. 6585,6588 (U.S. Supreme Court 1991). Rule 11 imposes an objective standard of reasonableness as the basis for imposing sanctions. *See Id.; see also, Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 1991 D.A.R. 2366 (U. S. Supreme Court 1991). Thus, regardless of a party's subjective intent, if it was objectively unreasonable to file a motion then sanctions must be imposed under Rule 11.

Here, all the objective factors favor a finding of unreasonableness. Plaintiffs have conceded that this motion was not filed due to the emergence of new law or facts. It is also clear that this motion was not filed due to a manifest showing of the failure to consider material facts previously presented to the court. Rather, this motion was filed due to an incorrect and unreasonable assumption that the Special Master's disagreement with plaintiffs' interpretation of the law and facts necessarily arises from his fundamental misunderstanding of the law and facts. This simply is not a basis for reconsideration under Rule 7.16. As such, the filing of the instant motion was patently unreasonable and sanctions are in order.

An order will follow.

* * *

ORDER

IT IS HEREBY ORDERED THAT plaintiffs' motion for reconsideration of the Special Master's order dated April 26, 1991 is DENIED. The Special Master also holds that the filing of the instant motion is sanctionable under Rule 11 of the Federal Rules of Civil Procedure and that accordingly the costs of opposing such motion should be borne by plaintiffs. THEREFORE IT IS

FURTHER ORDERED THAT plaintiffs pay defendants $7,380.00 forthwith.

IT IS SO ORDERED.

DATED: JULY 2, 1991

JAMES G. KOLTS
U.S. SPECIAL MASTER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER, a California Corporation, et. al.,
Plaintiffs,

vs.

ROBIN SCOTT, an individual, et. al.,
Defendants,

RELIGIOUS TECHNOLOGY CENTER, a California Corporation, et. al.,
Plaintiffs,

vs.

LARRY WOLLERSHEIM, an individual, et. al.,
Defendants.

AND RELATED COUNTER-CLAIMS

CV 85-711 JMI (Bx)
CV 85-7197 JMI (Bx)

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S APRIL 27, 1990 ORDER ADOPTING THE SPECIAL MASTER'S DISCOVERY ORDER OF APRIL 3, 1990

IT IS HEREBY ORDERED:

1. The Plaintiffs' motion for reconsideration of the Court's April 27, 1990 order adopting the April 3, 1990 discovery order of the Special Master is hereby DENIED.

2. The Plaintiffs contend that since the Court did not address three of their objections in its April 27, 1990 order adopting the Special Master's discovery order of April 3, 1990, there has been a manifest showing of a failure to consider material facts presented to the Court before such decision. Local Rule 7.16. Those issues include: that certain requests if produced as ordered, would require the Plaintiffs to violate the 1st amendment rights of association and privacy which the Plaintiffs owe to their members; that certain requests are not just burdensome, but irrelevant; and that documents relevant to the antitrust claim are entitled to ecclesiastical protection.

3. Local Rule 7.16 states that "[a] motion for reconsideration of the decision on any motion may be made only on the grounds of . . . (c) a manifest showing of a failure to consider material facts presented to the Court before such decision."

The Plaintiffs have made no showing at all of the Court's failure to consider material facts or issues. When the Court adopted the Special Master's order, the Court concluded that none of the Plaintiffs' objections had merit. The Court did however, comment on the areas where it thought some additional guidance was required. No additional comment by this Court was required since it adopted all of the Special Master's findings and orders.

What the Plaintiffs are alleging by this motion is that the Court did not read all of the Plaintiffs papers. The Plaintiffs can be assured that the Court read and carefully considered all of their objections. As a whole, the Court found them without merit and agreed with the Special Master's findings and order.

In order to bring a motion for reconsideration, the party requesting reconsideration must establish a manifest showing of a failure to consider facts with more than just the assertions that are alleged here. The party must point to specific facts that were not considered by the Court. The parties are required to assume that the Court read and considered all of the information that it was provided in a motion. In order to obtain reconsideration on this ground the party must point to facts which could not possibly have been considered either because of erroneous statements made by the Court or conclusions that the Court made which can not be supported in any way by the facts of the case. *See* ***Backlund v. Barnhart***, 778 F.2d 1386 (9th Cir. 1985) (Where the Court held that a motion for reconsideration was properly denied if it presented no new arguments.)

In this case, the Plaintiffs have not pointed to facts which the Court failed to consider. Therefore, this motion is not properly brought under Local Rule 7.16, and should be denied.

IT IS SO ORDERED.

DATED: 20 August 1990

/s/ J. IDEMAN

JAMES M. IDEMAN
United States District Judge

DECLARATION OF HON. JAMES M. IDEMAN

I, James M. Ideman, declare as follows:

1. Portions of this petition will become moot because I have decided to recuse myself from this case. Plaintiff has recently begun to harass my former law clerk who assisted me on this case, even though she now lives in another city and has other legal employment. This action, in combination with other misconduct by counsel over the years has caused me to reassess my state of mind with respect to the propriety of my continuing to preside over the matter. I have concluded that I should not. I have delayed the effective date of my recusal, however, so that I could respond on behalf of my court to the allegations in the petition.

2. I should say at the outset that this case should soon be concluded in the District Court and thus available for appellate review. I am confident that such a review will reveal that the plaintiff's claims raised in this petition are groundless. I would strongly recommend that any definitive appellate action be deferred pending a thorough review on appeal and that years of work not be wiped out by granting petitioner's extraordinary writ.

3. The past 8 years have consisted mainly of a prolonged, and ultimately unsuccessful, attempt to persuade or compel the plaintiff to comply with lawful discovery. These efforts have been fiercely resisted by plaintiffs. They have utilized every device that we on the District Court have ever heard of to avoid such compliance, and some that are new to us.

4. This noncompliance has consisted of evasions, misrepresentations, broken promises and lies, but ultimately with refusal. As part of this scheme to not comply, the plaintiffs have undertaken a massive campaign of filing every conceivable motion (and some inconceivable) to disguise the true issue in these pretrial proceedings. Apparently viewing litigation as war, plaintiffs by this tactic have had the effect of massively increasing the costs to the other parties, and, for a while, to the Court. The appointment of the Special Master 4 years ago has considerably relieved the burden to this Court. The scope of plaintiff's efforts have to be seen to be believed. (*See*, Exhibit "A", photo of clerk with filings, and

Exhibit "B", copy of clerk's docket with 81 pages and 1,737 filings.)

5. Yet, it is almost all puffery — motions without merit or substance. Notwithstanding this, I have carefully monitored the Special Master's handling of these motions. I saw no need to try to improve on the Special Master's writings if I agreed with the reasons and the results. However, with respect to the major ruling that I have made during these proceedings, the dismissal of the plaintiff's claims, the following occurred:

6. The Special Master, after years of efforts to compel compliance with discovery, purported to order a dismissal of plaintiff's claims. Although the action was probably long overdue, the Special Master did not have the authority to make such a dispositive order. In reviewing his order, as I did with all of his actions, I saw what he had done and did not approve it. I treated the Special Master's "order" as a recommendation and gave notice to the parties that they could have a hearing and invited briefs. Only after considering fully the briefs of the parties did I give approval to the dismissal. It is true that I adopted the language chosen by the Special Master, but that was because I fully agreed with his reasoning and saw no need to write further.

7. Plaintiffs are unhappy with Judge Kolts and me for insisting that they comply fully with discovery or forfeit their case. For this reason they wish to have our work set aside and begin anew with another judge who may, they hope, permit them to litigate their claims without complying with discovery, or, perhaps, to further punish the other parties with more years of expensive litigation. This they should not be permitted to do, especially by means of the limited review possible on an extraordinary writ.

8. I respectfully recommend that the petitioner's claims that are not mooted by my withdrawal from the case be denied without prejudice to review of same upon appeal.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of June, 1993 at Los Angeles, California.

/s/ JAMES M. IDEMAN

James M. Ideman
United States District Judge